

PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Wisconsin Public Service Corporation for
Declaratory Ruling Regarding the Right to Self-Supply
Station Power to Fox Energy Center

6690-DR-109

FINAL DECISION

This is the Final Decision granting Wisconsin Public Service Corporation's (WPSC) request for a declaratory ruling that it is entitled to self-supply electric power to its Fox Energy Center (Facility). The Fox Energy Center is located within the retail electric service territory of the City of Kaukauna's municipal electric utility (KU).

WPSC filed the Petition on March 5, 2014. ([PSC REF#: 200023](#).) KU responded to the Petition on March 17, 2014, supporting the request to open a docket and issue a declaratory ruling. ([PSC REF#: 200505](#).) The Commission opened a docket and set a briefing schedule. ([PSC REF#: 203836](#).) The parties stipulated to relevant facts and filed concurrent rounds of initial and reply briefs. ([PSC REF#: 204826](#); [PSC REF#: 204825](#); [PSC REF#: 204832](#); [PSC REF#: 205957](#); [PSC REF#: 205966](#).)

The Commission discussed this proceeding at its open meeting of August 14, 2014. The Petition is granted, subject to the terms and conditions of this Final Decision.

BACKGROUND

Wisconsin Stat. § 196.495 governs where and under what circumstances utilities may provide retail electric service to customers. The statute allows utilities to provide electric service to their own facilities, wherever those facilities may be located. Wis. Stat. § 196.495(3). The

statute also permits utilities, however, to execute territorial agreements with a neighboring utility that may be contrary to the general rules in Wis. Stat. § 196.495. Wis. Stat. § 196.495(4). If a territorial agreement is filed with and approved by the Commission, the Commission must enforce the agreement. *Id.* Thus, the Legislature has charged the Commission with interpreting and enforcing territorial agreements between public utilities. *Id.*

WPSC and KU have electric public utility operations in areas contiguous to the other utility's service territory. On September 20, 2004, the utilities entered in a Territorial Agreement (Agreement) to set forth mutually agreed upon boundaries of each utilities' service territory. ([PSC REF#: 22204.](#)) The Agreement was approved by the Commission by order signed November 11, 2004, in docket No. 5-BS-137. ([PSC REF#: 24378.](#)) The Agreement defines a boundary line, with KU having the exclusive right to provide retail electric service west of the line and WPSC having the exclusive right to provide retail electric service east of the line, subject to the terms and conditions of the Agreement. The Agreement does not address specifically whether a utility's right to provide service to its own facilities under Wis. Stat. § 196.495(3) is retained. Conversely, the Agreement also does not indicate in any manner that the same right is waived. The Petition raises the question of whether the Agreement, governing the provision of retail electric service, was also intended to govern the provision of station power to a large electric generating facility.

FINDINGS OF FACT

1. The Facility is a 593 megawatt (MW) natural gas-fired combined-cycle electric generating facility located in the Village of Wrightstown, Wisconsin. The Facility commenced commercial operation in June 2005 and is located within KU's electric retail service territory and

is on KU's side of the boundary line. KU began providing retail, end-use electric service to the Fox Energy Center construction site beginning in November 2003 and began providing station power to Unit 1 on January 2, 2005. KU continues to provide retail electrical services to the Facility.

2. These services include station power to the Facility itself and power for the Facility's water pumping station, which is located in the city of Kaukauna. Station power is the electricity used for heating, lighting, air conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electrical equipment that is on the site.

3. At the time the Agreement was executed and until March 2013, the Facility was owned by Fox Energy Center, LLC, which in turn was owned by affiliates of General Electric and Tyr Energy. On March 28, 2013, WPSC purchased Fox Energy Center, LLC, from General Electric and Tyr Energy. Upon the closing of that transaction, Fox Energy Center, LLC, was merged into WPSC. Since April 2013, KU has billed WPSC for electrical services provided to the Facility, and WPSC has paid the bills for such services.

4. On May 31, 2013, WPSC notified KU of WPSC's intent to remotely self-supply the Facility. On June 10, 2013, KU notified WPSC that KU would consider such self-supply to be a breach of the Agreement. Since July 2013, WPSC has paid such bills under protest.

5. The Facility is interconnected directly to the American Transmission Company (ATC) transmission system. The Facility is connected to an ATC substation that is located on the Facility's site. The ATC substation is connected to an ATC 345 kilovolt transmission line.

6. No KU distribution facilities are interconnected with the Facility. KU uses meters owned by its wholesale energy supplier, WPPI Energy, to measure the retail electric services that KU provides to the Facility. WPSC pays a monthly metering charge of about \$1,200 to WPPI Energy. KU provides station power to the Facility pursuant to KU's CP-2 retail tariff. Under this tariff, WPSC pays KU a customer charge of \$100/month and a distribution demand charge of about \$10,000/month.

7. The station power load KU serves is between 3 MW (on-peak) and 6 MW (off-peak). Based on KU's last rate study, which used a 2012 test year, the loss of revenue from this load if WPSC self-supplies station power would cause a reduction in KU's rate of return by 0.77 percent, all other things held equal. Moreover, if KU's rates were adjusted for the loss of revenue from this load, KU's rates would increase by 0.98 percent across all customers, all other things held equal.

8. Conversely, if WPSC self-supplies station power to the Facility, WPSC will realize savings of approximately \$775,000 annually.

9. The Agreement does not prohibit WPSC from remotely self-supplying the Facility.

10. It is reasonable to allow KU an opportunity to adjust its rates before WPSC commences self-supplying station power to the Facility and to require that KU file any such request within six months of the effective date of this Final Decision.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to render this declaratory ruling pursuant to Wis. Stat. §§ 196.395, 196.495, and 227.41.

2. The Agreement does not prohibit WPSC from remotely self-supplying the Facility.

DISCUSSION

The Petition requests a declaration that WPSC is legally entitled to remotely self-supply the Facility. WPSC raised three independent legal bases in support of its position that it must be allowed to provide station power to the Facility. First, WPSC argues that the Midcontinent Independent System Operator, Inc. (MISO), Schedule 20 provides WPSC the absolute right to remotely self-supply station power. Second, if it does not, WPSC argues that Wis. Stat. § 196.495(3) provides that same absolute right. Finally, WPSC also argues that the provision of station power is not governed by the Agreement. Each of these arguments would independently provide WPSC the right to provide station power to the Facility. Because the Commission determines that the Agreement permits the provision of remote station power by WPSC to the Facility, there is no need and the Commission does not determine the effect of the MISO Schedule 20.

The Commission is charged by the Legislature with interpreting and applying Wis. Stat. § 196.495. That statute specifically places upon the Commission the duty to first approve and then ultimately enforce any territorial agreement between public utilities. Wisconsin Stat. § 196.495(4) provides:

To avoid duplication of facilities, a public utility and a cooperative association may enter into a written agreement governing the extension of electric distribution lines and the right to serve customers. The commission shall enforce an agreement if the agreement has been filed with the commission and approved by the commission as being in the public interest.

(Emphasis supplied.)

The Commission has been interpreting this statute and adjudicating disputes between public utilities arising therefrom for over 40 years. *See e.g., Wisconsin Power & Light Co. v. Pub. Serv. Comm'n*, 45 Wis. 2d 253, 172 N.W.2d 639 (1969); *Barron Elec. Co-op. v. Pub. Serv. Comm'n of Wis.*, 212 Wis. 2d 752, 569 N.W.2d 726 (Ct. App. 1997). In making such determinations, the Commission relies upon the facts developed in the record, its special expertise and experience in the oversight of and the laws governing public utilities, and the language of any territorial agreement.

Wisconsin law clearly gives WPSC the right to provide electric service to its own facilities. Wis. Stat. § 196.495(3). Thus, the ultimate question in this case is whether the Agreement itself waives or modifies that right respective to the Facility. The Commission determines that WPSC's statutory rights clearly expressed in Wis. Stat. § 196.495(3) have not been waived or modified by the Agreement because: (1) the provision of station power within another utility's service territory is an unusual circumstance; (2) the Facility was not owned by WPSC at the time the Agreement was executed; and (3) the text of the Agreement does not indicate in any manner that either party contemplated that it would govern the provision of station power. As a result, WPSC may provide remote station power and decline to accept retail electric service from KU.

Wisconsin Stat. § 196.495

WPSC argues that Wis. Stat. § 196.495(3) grants it the right to supply station power. It provides:

Nothing in this section shall preclude any public utility or any cooperative association from extending electric service to its own property or facilities or to another cooperative association for resale.

KU acknowledges that the statute allows utilities to self-supply, but notes that a utility may nevertheless agree to waive that right and argues that WPSC has done so in this case.

KU also argues that the purpose of Wis. Stat. § 196.495 in general and Wis. Stat. § 196.495(4) will be frustrated by allowing WPSC to provide station power to the Facility. As the agency charged with regulating public utilities in general, and specifically charged with effectuating territorial agreements, the Commission recognizes the value of this statutory scheme. The purpose of Wis. Stat § 196.495 generally is the avoidance of duplication of facilities. The public policies underlying that goal are clear. First, the avoidance of duplication of facilities helps to control costs that ratepayers pay for those facilities. Second, the statute also prevents the physical construction of unnecessary facilities. These are indeed important public policy objectives.

The provision of station power by WPSC, though, will not interfere with those objectives. KU currently provides retail electric service, but the Facility takes power directly from the transmission system. No additional lines will be built for WPSC to begin providing station power. In any event, while the general policy of the avoidance of duplication of facilities is clearly expressed in that statute, the statute also makes a direct exception to that general policy goal for the provision of electric service to a utility's own facilities. Wis. Stat. § 196.495(3). Thus, the general purpose of the remainder of the statute is largely irrelevant.

KU also notes that, because the statute permits territorial agreements, it favors negotiated resolutions to territorial disputes. Territorial agreements permit utilities to plan the extension of their distribution systems in a more deliberate and comprehensive manner. They also eliminate the potential for litigation when development occurs in areas adjacent to two utilities. The

Commission also regularly approves territorial agreements that result in existing customers receiving cheaper rates. The statute clearly does favor those resolutions. However, KU is not correct that these objectives will be frustrated by permitting WPSC to provide station power.

Essentially KU argues that the entire scheme of territorial agreements will be dramatically altered by finding that this Agreement did not govern the provision of station power. This ruling, however, is based upon the specific facts presented by the parties and the specific language of this Agreement and is limited to this case. The interpretation of every such agreement will depend on the terms of that agreement and other relevant facts. In any event, the Commission is not aware of any other similar dispute regarding the provision of station power. The parties have identified only one other analogous situation, and that utility is permitted to self-supply despite the generating station's location within another utility's service territory. Thus, to the extent KU is concerned that this decision may impact the interpretation of existing territorial agreements, there is no evidence in the record to support that concern.

The Territorial Agreement

The fundamental question raised by this Petition is whether WPSC has, by execution of the Agreement, waived any state or federal right to remotely self-supply the Facility. "The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 30, 264 Wis. 2d 60, 665 N.W.2d 257. In so doing, the Commission begins with a review of the four corners of the contract.

The language of the Agreement simply does not address—let alone establish a waiver of—the parties' right to self-service under Wis. Stat. § 196.495(3). KU does not argue that

station power was specifically considered or acknowledged in the text of the Agreement. No evidence was presented in this proceeding or argument based upon the text of the Agreement that either party contemplated that the right to self-supply would be altered by the Agreement.

Rather, KU argues that it is sufficient that the Agreement delineates boundaries between the utilities. Section 2 grants each party the exclusive right to provide electric service to customers on its respective side of the boundary line, and Section 4 gives each party the right to continue providing service to all its existing customers as of the date of the Agreement. Because the facility is within KU's boundary, KU asserts WPSC has waived any right to serve that property. Neither of these provisions specifically identifies how the parties will treat utility-owned property, station power, or the rights of utilities to self-serve under Wis. Stat. § 196.495(3).

Both parties also argue that Section 10 of the Agreement, the Reservation of Rights clause, supports their interpretation of the contract. The clause provides:

Retention of Rights. Except as specifically set forth herein, this Agreement does not modify or limit the legal rights of either party, including but not limited [to] KU's right under Chapter 197 of the Wisconsin Statutes. KU and WPSC may exercise all rights not inconsistent with this Agreement.

KU argues that the exercise of the right to provide station power would be "inconsistent with the Agreement" because it would avoid the application of the boundary line clearly set forth in the Agreement. WPSC argues, on the other hand, that because the Agreement does not "specifically set forth" a waiver of its statutory right to self-supply, Section 10 reserves that right.

In large part, the argument as to the effect of Section 10 on this dispute is simply another way of recasting the parties' arguments on the general question of this case: does the Agreement govern station power? If it does, it would be inconsistent with the Agreement to allow WPSC to

self-supply. If it does not, then this clause simply reaffirms that right. However, the clause must be interpreted to mean something. The Commission agrees with WPSC that the clause confirms a general rule of contract law: waivers of statutory rights must be clear and express. *Faust v. Ladysmith-Hawkins School Systems, Joint Dist. No. 1*, 88 Wis. 2d 525, 532–33, 277 N.W.2d 303 (1979), *on rehearing*, 88 Wis. 2d 525, 281 N.W.2d 611 (1979) (*per curiam*). The Reservation of Rights clause, thus, simply indicates the parties’ intention to execute a contract that is not broadly interpreted.

The Commission is not persuaded that the act of setting boundary lines in this case indicates an intention of either party at the time of contracting for this Agreement to govern the provision of station power. Most importantly, nothing in the Agreement indicates that station power was considered. KU notes correctly that the Agreement does not specifically identify the other rights waived by delineating the boundary. For example, the Agreement does not specifically state that KU and WPSC are waiving any rights to the protection of the 500-foot secondary extension rules in Wis. Stat. § 196.495(1m)(a). According to KU’s argument, then, the Agreement must either mention every section of the statute, or none are required to be specifically waived. But the right to self-supply utility-owned property is significantly different than the other rights found in Wis. Stat. § 196.495.

As KU recognizes, territorial agreements are executed “[t]o avoid the duplication of facilities.” Wis. Stat. § 196.495(4). The 500-foot secondary extension rules and the rules regarding providing retail electric service within municipalities exist solely to avoid the duplication of facilities. No such concern exists with respect to station power. Not only does the Facility require no additional power lines to serve, but the provision protecting the right to

self-supply itself is an exception to the avoidance of the duplication of facilities policy. In other words, the law places the right of utilities to self-supply service to their own property above the general policy of the statute. This is not to suggest that every territorial agreement in the state must specifically reference Wis. Stat. § 196.495(3) or name the specific utility-owned property. Each contract will be evaluated by the terms and circumstances surrounding its execution and facts otherwise in the record. But there must be some indication in the record or contract that the right was intended to be waived. No such evidence was presented here.

To the contrary, at the time of the execution of the Agreement, WPSC did not own the Facility (or any other generating facility in KU's territory) and had no intention of providing service to the then-owner of the Facility. The parties could not have foreseen that WPSC would acquire the Facility, and therefore, there was no reason for the parties to address self-service in the Agreement.

The Commission determines that the Agreement does not waive or otherwise modify WPSC's right to remotely provide station power because: (1) the Agreement does nothing more than delineate a boundary between the utilities and does not otherwise reference station power; (2) the Facility was not owned by WPSC at the time of the execution of the Agreement; and (3) the provision of station power to the Facility does not require the construction of new utility lines.

Effective Date of Transfer

KU notes that the impact of the loss of load from losing the Facility as a customer will have a significant impact on the revenue of the utility. KU requests that the Commission delay implementation of this Final Decision until after it has a chance to adjust its rates. KU

specifically requests that it be allowed to continue to serve the Facility after the conclusion of a rate case that may be filed as late as six months after a “final non-appealable court decision.” Requiring WPSC to wait for the conclusion of potential litigation, plus additional time to complete a rate case is not reasonable. Commission orders are effective during court review, and the Commission sees no reason to amend that general rule. Wis. Stat. § 196.40. WPSC requested to self-supply the facility on May 31, 2013. Any further delay in WPSC’s ability to self-supply the facility should be limited. The Commission recognizes that the Facility is a significant customer of KU. In order to avoid financial harm to KU, it is reasonable to require WPSC to continue to receive station power from KU until KU has had the opportunity to adjust its rates. Any such rate case must be filed within six months after the effective date of this Final Decision and shall be timely prosecuted by KU. If KU does not file a rate case within six months of this Final Decision, WPSC may begin self-supplying the day following KU’s deadline to file its rate case. If KU files a timely rate case, WPSC may begin self-supplying the Facility on the effective date of the order adjusting KU’s rates.

ORDER

1. WPSC’s Petition for a declaratory ruling is granted.
2. WPSC shall continue to receive station power from KU until KU has had the opportunity to adjust its rates. Any such rate case must be filed within six months after the effective date of this Final Decision and shall be timely prosecuted by KU. If KU does not file a rate case within six months of this Final Decision, WPSC may begin self-supplying the day

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following KU's deadline to file its rate case. If KU files a timely rate case, WPSC may begin self-supplying the facility on the effective date of the order adjusting KU's rates.

3. This Final Decision is effective one day after the date of service.

Dated at Madison, Wisconsin, this 25th day of September, 2014.

By the Commission:

A handwritten signature in black ink, reading "Sandra J. Paske". The signature is written in a cursive, flowing style with a long horizontal line extending from the end.

Sandra J. Paske
Secretary to the Commission

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